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The Final Countdown: California Public Employees' Retirement System v. ANZ Securities and the Sweeping Ban on Tolling Statutes of Repose in Class Actions

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Comment

THE FINAL COUNTDOWN: *CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM v. ANZ SECURITIES* AND THE SWEEPING BAN ON TOLLING STATUTES OF REPOSE IN CLASS ACTIONS

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> *[Jamie] Dimon, the chief executive of JP Morgan Chase . . . had spent part of the prior evening at an emergency, all-hands-on-deck meeting at the Federal Reserve Bank of New York with a dozen of his rival Wall Street CEOs. Their assignment was to come up with a plan to save Lehman Brothers, the nation's fourth-largest investment bank—or risk the collateral damage that might ensue in the markets.*
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> . . . .
>
> *. . . Saturday's papers prominently featured the dramatic news to which he had alluded. Leaning against the kitchen counter, Dimon opened the* Wall Street Journal *and read the headline of its lead story: "Lehman Races Clock; Crisis Spreads."*
>
> *Dimon knew that Lehman Brothers might not make it through the weekend. . . . In the next twenty-four hours, Dimon knew, Lehman would either be rescued or ruined.*[1]

In September 2008, Lehman Brothers Holdings ("Lehman Brothers") declared bankruptcy in a move that "reshape[d] the landscape of American finance."[2] In the last year of its life, Lehman Brothers used public securities offerings in an attempt to raise capital and increase its liquidity.[3] The

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1. ANDREW ROSS SORKIN, TOO BIG TO FAIL 1–2 (2011 ed.).

2. Andrew Ross Sorkin, *Lehman Files for Bankruptcy; Merrill Is Sold*, N.Y. TIMES (Sept. 14, 2008), http://www.nytimes.com/2008/09/15/business/15lehman.html.

3. Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042, 2047–48 (2017).

Securities and Exchange Commission ("SEC") requires that a company making a public security offering register the security and disclose important financial information.[4] The registration statements must include: "[a] description of the company's properties and business; [a] description of the security to be offered for sale; [i]nformation about the management of the company; and [a] [f]inancial statement certified by independent accountants."[5]

When Lehman Brothers made its public offerings in 2007 and 2008, its registration statements—prepared by underwriters[6] from a variety of financial firms—contained allegedly falsified information regarding its accounting practices and risk management procedures.[7] Under Section 11 of the Securities Act of 1933 ("Section 11"), plaintiffs can bring an action against underwriters of a security registration statement if the statement contains a misstatement or omission of a material fact.[8] Claims made under Section 11 are subject, however, to the limitations of action provision codified in Section 13 of the Securities Act of 1933 ("Section 13"), which requires that a plaintiff bring the action within one year of discovering the falsity or within three years of the security's public offering.[9]

In June 2008, a retirement fund that bought some of the relevant Lehman Brothers securities offerings filed a class action in the Southern District of New York against a variety of underwriters who had prepared the securities' registration statements.[10] The class action sought to impose liability on the underwriters under Section 11.[11] Though it was not a named plaintiff, California Public Employees' Retirement System ("CalPERS") was a member of the class action in New York.[12] But in February 2011, the district court still had not certified the class action.[13]

CalPERS decided to take matters into its own hands and filed its own suit against the underwriters in the Northern District of California on Feb-

4. *Registration Under the Securities Act of 1933*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/fast-answers/answersregis33htm.html (last modified Sept. 2, 2011).

5. *Id.*

6. In the securities context, an underwriter is either a person or an entity, commonly an investment bank, that "guarantees the sale of newly issued securities by purchasing all or part of the shares for resale to the public." *Underwriter*, BLACK'S LAW DICTIONARY (10th ed. 2014).

7. Petition for Writ of Certiorari at 3, Cal. Pub. Emps.' Ret. Sys. v. Moody Inv'rs Serv., Inc., 137 S. Ct. 2042 (2017) (No. 16-373).

8. Securities Act of 1933 § 11, 15 U.S.C. § 77k (2016).

9. Securities Act of 1933 § 13, 15 U.S.C. § 77m (2016).

10. Petition for Writ of Certiorari at 3, *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. 2042 (No. 16-373).

11. *Id.*

12. *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2048.

13. Petition for Writ of Certiorari at 4, *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. 2042 (No. 16-373).

ruary 7, 2011.[14] The claims alleged by CalPERS in its individual suit were identical to those Section 11 violations alleged in the New York class action.[15] CalPERS's individual action was transferred to the Southern District of New York and consolidated with the class action shortly after its filing.[16] Later that year, the class action reached a settlement, and the district court certified the class so the settlement could move forward.[17] When CalPERS received notice of the class action settlement (CalPERS was still a member of the class even though it was also pursuing an individual action), it decided to opt out of the settlement to continue to pursue its own individual claims.[18]

Unfortunately for CalPERS, the district court dismissed its individual suit as untimely filed under Section 13 of the Securities Act of 1933, because the action was initiated in February 2011—more than three years after the public offerings.[19] The United States Court of Appeals for the Second Circuit affirmed the district court's dismissal in 2016.[20] Ultimately, the United States Supreme Court affirmed the Second Circuit's ruling and held that the action was untimely because the three-year time bar in Section 13 is a statute of repose that cannot be tolled[21] while a class action is pending.[22]

This Comment first examines the legal history of both the Securities Act of 1933 and the Securities Exchange Act of 1934 and the doctrine of tolling statutory time bars in class actions.[23] This Comment then examines the path and analysis of CalPERS's claims in both the Second Circuit and the Supreme Court.[24] Next, this Comment analyzes the Supreme Court's holding in *California Public Employees' Retirement System v. ANZ Securi-*

14. *Id.*

15. *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2048.

16. Petition for Writ of Certiorari at 4–5, *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. 2042 (No. 16-373).

17. *Id.* at 5.

18. *Id.*

19. *Id.*

20. *See In re* Lehman Bros. Sec. & ERISA Litig., 655 F. App'x 13, 16 (2d Cir. 2016), *aff'd sub nom.* Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042 (2017).

21. The principle of "tolling" a statutory time bar pauses the timeliness requirement. When a time bar is tolled in circumstances where a suit was filed first in one court and then filed again in another court (as is frequently the case with class action claims), the limitations period "does not run while the litigation is pending" in the first court. *Equitable Tolling*, BLACK'S LAW DICTIONARY (10th ed. 2014). In this case, CalPERS argued that the filing of the original class action in the Southern District of New York paused—or tolled—the three-year time bar in Section 13, and that the limitations period should not have resumed running until after the New York class was certified. Brief for Petitioner at 8–9, Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs. Inc., 137 S. Ct. 2042 (2017) (No. 16-373).

22. *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2055.

23. *See infra* Part I.A–C.

24. *See infra* Part I.D.

ties, Inc.[25] and concludes the holding was correct.[26] Following this conclusion, this Comment argues that the Supreme Court's holding in *California Public Employees' Retirement System v. ANZ Securities, Inc.* should be applied broadly to all statutes of repose.[27]

I. BACKGROUND

This Part will discuss the legislative history of Section 13 of the Securities Act of 1933 and the development of the equitable tolling principle as it relates to class action lawsuits.[28] First, it will examine the original Securities Act of 1933 and its subsequent modifications in the Securities Exchange Act of 1934.[29] Next, it will give a brief overview of *American Pipe & Construction Co. v. Utah*[30] and the tolling principle that case introduced for class action lawsuits.[31] Third, it will examine the circuit split that has developed since *American Pipe* regarding whether the tolling principle set forth in that case applies to statutes of repose—in particular, the repose period codified in Section 13 of the Securities Act of 1933.[32] Finally, it will summarize *California Public Employees' Retirement System v. ANZ Securities*,[33] its procedural background, and the Supreme Court's reasoning in deciding that *American Pipe* equitable tolling does not apply to the Section 13 statute of repose.[34]

A. The Securities Act of 1933 and the Securities Exchange Act of 1934, and the History and Construction of Section 13

In 1932, the Senate Committee on Banking and Currency began an expansive investigation into the "practices with respect to the buying and selling and the borrowing and lending of listed securities upon the various stock exchanges."[35] At the directive of President Franklin D. Roosevelt, the Committee was tasked with creating legislation to avoid the "unregulated speculation in securities" that led to the stock market crash of 1929 and the events thereafter.[36] In 1933, Congress passed the Securities Act of 1933

25. 137 S. Ct. 2042 (2017).
26. *See infra* Part II.A.
27. *See infra* Part II.B–C.
28. *See infra* Part I.
29. *See infra* Part I.A.
30. 414 U.S. 538 (1974).
31. *See infra* Part I.B.
32. *See infra* Part I.C.
33. 137 S. Ct. 2042 (2017).
34. *See infra* Part I.D.
35. S. REP. NO. 73-1455, at 1 (1934).
36. S. REP. NO. 73-792, at 2 (1934) (quoting Letter from Franklin D. Roosevelt, President, U.S., to Duncan V. Fletcher, Chairman, Senate Banking & Currency Comm. (Mar. 26, 1934)).

regulating the sale of securities to the public with the intention to "provide full and fair disclosure of the character of securities sold . . . and to prevent frauds in the sale thereof."[37] The Act is still used for the safety of investors and to ensure that companies that issue securities offerings include all information a buyer would need to make a fully informed purchase.[38]

Section 11 of the Securities Act of 1933 provided a cause of action allowing individuals or companies that purchased securities offered with false registration information to seek legal remedy from various parties, including from underwriters.[39] Additionally, Section 13 of the Act contained a "Limitation of Actions" provision that applied to claims brought under Section 11.[40] In 1933, Section 13 provided:

> No action shall be maintained to enforce any liability created under section 11 . . . unless brought within two years after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence . . . . In no event shall any such action be brought to enforce a liability created under section 11 . . . more than ten years after the security was bona fide offered to the public.[41]

While a large portion of the Securities Act of 1933 remains unchanged in its current form, the Securities Exchange Act of 1934 modified Section 13 merely a year later.[42] The 1934 Act amended Section 13 by changing the "two years" provision to "one year" and the "ten years" provision to "three years."[43] Notably, this amendment significantly shortened the period of time after which the Act would completely bar a potential plaintiff from

37. Securities Act of 1933, ch.38, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a–77aa (2016)).

38. *See* Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1323 (2015) (quoting Pinter v. Dahl, 486 U.S. 622, 646 (1988)); *id.* (stating that Section 11 of the Securities Act of 1933 "promotes compliance with these disclosure provisions by giving purchasers a right of action . . . for material misstatements or omissions in registration statements").

39. Securities Act of 1933, ch. 38 § 11, 48 Stat. 74, 82–83 (codified as amended at 15 U.S.C. § 77k (2016)).

40. *Id.* § 13, at 84. Section 13 also applies to claims brought under Section 12 of the Securities Act of 1933, which is not relevant to this Comment's analysis. *See* 15 U.S.C. § 77l.

41. Securities Act of 1933, ch. 38 § 13, 48 Stat. 74, 84 (codified as amended at 15 U.S.C. § 77m).

42. *Compare id.* ("No action shall be maintained . . . unless brought within two years after the discovery . . . . In no event shall any such action be brought . . . more than ten years after the security was bona fide offered to the public."), *with* Securities Exchange Act of 1934, ch. 404, sec. 207, § 13, 48 Stat. 881, 908 (codified as amended at 15 U.S.C. § 77m) ("Section 13 of such Act is amended (a) by striking out 'two years' wherever it appears therein and inserting in lieu thereof 'one year'; (b) by striking out 'ten years' and inserting in lieu thereof 'three years' . . . .").

43. Securities Exchange Act of 1934, ch. 404, sec. 207, § 13, 48 Stat. 881, 908 (codified as amended at 15 U.S.C. § 77m).

bringing a Section 11 claim.[44] When the Securities Act of 1933 was codified, Section 13 incorporated the one-year and three-year time bars from the amended Securities Exchange Act of 1934.[45]

The dual time bar contained in Section 13 gives rise to a common feature of statutory time limits: the pairing of a statute of limitations with a statute of repose.[46] Statutes of limitations and statutes of repose begin to run at different points in time and are aimed at achieving different purposes.[47] With a statute of limitations, the clock starts ticking when the claim accrues, meaning "when the injury occurred or was discovered."[48] Statutes of limitations are intended to encourage plaintiffs to "pursue 'diligent prosecution of known claims.'"[49] In contrast, with a statute of repose, the clock begins ticking immediately from the "date of the last culpable act or omission of the defendant."[50] Because the running of a statute of repose is not contingent on whether the injury has been discovered, it serves as a "cutoff" of a defendant's liability.[51] Since the three-year provision in Section 13 is measured from when the security is offered (that is, the last culpable act of the defendant), and uses the phrase "[i]n no event shall any such action be brought,"[52] courts have construed the provision as a statute of repose.[53]

B. American Pipe *and the Principle of Equitable Tolling in Class Actions*

In 1974, the United States Supreme Court issued a landmark opinion in *American Pipe & Construction Co. v. Utah*[54] on the interaction between

44. For the significance of this change, see *infra* Part II.A.

45. Securities Act of 1933, 15 U.S.C. §§ 77a–aa. When codified in the United States Code, this provision retained the name "Securities Act of 1933," although it included the amended provisions from the Securities Exchange Act of 1934. As a result, this Comment will refer to the Act as the "Securities Act of 1933," but will continue to reference the one- and three-year time bars.

46. *See* Gabelli v. SEC, 568 U.S. 442, 453 (2013) ("[S]tatutes applying a discovery rule . . . often couple that rule with an absolute provision for repose . . . ."); *see also* Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042, 2045 (2017) ("The pairing of a shorter statute of limitations and a longer statute of repose is a common feature of statutory time limits.").

47. CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2182 (2014).

48. *Id.* (quoting BLACK'S LAW DICTIONARY 1546 (9th ed. 2009)).

49. *Id.* at 2183 (quoting BLACK'S LAW DICTIONARY 1546 (9th ed. 2009)).

50. *Id.* at 2182.

51. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363 (1991).

52. Securities Act of 1933 § 13, 15 U.S.C. § 77m (2012).

53. *See Lampf*, 501 U.S. at 363 (referring to the three-year provision in Section 13 as a "period of repose," and stating its purpose is "clearly to serve as a cutoff"); P. Stoltz Family P'ship v. Daum, 355 F.3d 92, 96 (2d Cir. 2004) (stating that claims brought under Section 12 of the Securities Act face a three-year "statute of repose"); Caviness v. Derand Res. Corp., 983 F.2d 1295, 1300 (4th Cir. 1993) (stating that the three-year limitation in Section 13 is a statute of repose, and that the language "allows for no qualification").

54. 414 U.S. 538 (1974).

statutes of limitations and class actions under Federal Rule of Civil Procedure 23 ("FRCP 23").[55] Under FRCP 23, one or more members of a qualifying class may sue one or more defendants on behalf of a group of similarly situated plaintiffs.[56] However, in order for a class action to be maintained, the class must be certified by a court.[57] While FRCP 23 instructs that a court should certify a class "[a]t an early practicable time,"[58] the certification process is not always efficient, and a class may not be certified before the statute of limitations or statute of repose for filing an individual action expires.[59]

In *American Pipe*, the State of Utah filed a class action against American Pipe & Construction Co. ("American Pipe") for violations of federal antitrust law.[60] The class action was filed eleven days before the statute of limitations expired.[61] Six months later, the United States District Court for the Central District of California granted American Pipe's motion claiming that the suit could not be certified as a class action,[62] because the class was not "so numerous" under FRCP 23(a)(1).[63]

Eight days after class status was denied, numerous members of the would-be class filed motions to intervene as plaintiffs in the action, but the district court denied all motions as untimely.[64] The United States Court of Appeals for the Ninth Circuit reversed and found that the would-be class members' actions were commenced by the State of Utah's filing, and therefore were not in violation of the statute of limitations.[65] The Supreme Court affirmed that the statute of limitations was tolled[66] while the class action was still pending.[67] As a result, because Utah filed the class action eleven

55. *Id.* at 540.

56. FED. R. CIV. P. 23(a).

57. FED. R. CIV. P. 23(c).

58. *Id.* 23 (c)(1)(A).

59. *See* STEFAN BOETTRICH & SVETLANA STARYKH, NERA ECON. CONSULTING, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2016 FULL-YEAR REVIEW 23 (2017), http://www.nera.com/content/dam/nera/publications/2017/PUB_2016_Securities_Year-End_Trends_Report_0117.pdf (finding that in thirty-six percent of securities class actions filed and resolved from 2000 through 2016, it took courts three years or longer to hand down a decision on class certification).

60. *American Pipe*, 414 U.S. at 541. The specific claims litigated in *American Pipe* are not relevant to this Comment.

61. *Id.* at 541–42.

62. *Id.* at 542–43.

63. According to FRCP 23: "One or more members of a class may sue or be sued as such representative parties on behalf of all members only if: the class is so numerous that joinder of all members is impracticable . . . ." FED. R. CIV. P. 23(a)(1).

64. *American Pipe*, 414 U.S. at 543–44.

65. *Id.* at 545.

66. *See supra* note 21 (defining tolling and its application in class actions).

67. *American Pipe*, 414 U.S. at 561.

days before the statute of limitations expired, the individual plaintiffs had eleven days from the time the class was denied to file their own motions before the time bar expired.[68] Therefore, because the members' motions after the class denial were filed only eight days after class status was denied, the filings complied with the statute of limitations.[69]

This case gave rise to an equitable principle known as "*American Pipe* tolling." This principle establishes that while class action certification is pending, the statute of limitations is tolled for subsequent actions by individual class members from the time the class action is filed until certification is either denied or granted.[70] It is an equitable principle, not a legal one, because the Court based its decision in *American Pipe* on its "judicial power to toll statutes of limitation in federal courts."[71] Because this form of tolling was created by the judiciary and not by the legislature, "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute."[72] Since *American Pipe* established an equitable principle that originally applied to a statute of limitations, courts have been divided when analyzing whether *American Pipe* tolling can also apply to statutes of repose.[73]

C. *The Resulting Circuit Split on the Application of* American Pipe *Tolling to the Statute of Repose in Section 13 of the Securities Act of 1933*

Multiple United States Courts of Appeals, including the Second, Sixth, and Tenth Circuits,[74] have analyzed whether *American Pipe* tolling applies to Section 13 of the Securities Act of 1933.[75] As different circuits came to different conclusions, a circuit split emerged.

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68. *Id.*

69. *Id.*

70. *See id.* at 554 ("[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class . . . .").

71. *Id.* at 558.

72. United States v. Beggerly, 524 U.S. 38, 48 (1998) (citing United States v. Brockamp, 519 U.S. 347 (1997)).

73. *See infra* Part I.C.

74. *See* Stein v. Regions Morgan Keegan Select High Income Fund, Inc., 821 F.3d 780, 794–95 (6th Cir. 2016) (holding that the Section 13 statute of repose could not be tolled); Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc., 721 F.3d 95, 101 (2d Cir. 2013) (holding that the Section 13 statute of repose could not be tolled); Joseph v. Wiles, 223 F.3d 1155, 1168 (10th Cir. 2000) (holding that the Section 13 statute of repose was subject to tolling).

75. Other Courts of Appeals have also analyzed whether *American Pipe* tolling applies to statutes of repose other than the one in Section 13 of the Securities Act, including statutes of repose in other securities statutes, but those fall outside the scope of this Part of this Comment. *See, e.g.*, Dusek v. JPMorgan Chase & Co., 832 F.3d 1243 (11th Cir. 2016) (finding that claims brought under the Securities Exchange Act of 1934 § 20(a) are subject to a time bar similar to that in § 13, and *American Pipe* tolling is inapplicable to the statute of repose).

The Tenth Circuit was the first to decide the issue in *Joseph v. Wiles*[76] in 2000. In *Joseph*, the relevant public offerings were made in May 1987, and multiple class actions were filed against the defendants in 1989 and 1990.[77] The class actions, of which Mr. Joseph was a member, alleged, *inter alia*, violations under Section 11 of the Securities Act.[78] Mr. Joseph filed his own action alleging violations of Section 11 in August 1990, three months after the three-year statute of repose expired.[79] He asserted that the statute of repose was tolled by the other class actions filed in 1989, which also alleged Section 11 violations.[80] The Tenth Circuit held that because the other Section 11 class action claims against the defendants were timely filed, and because Mr. Joseph was a member of those classes, the statute of repose was tolled,[81] and his suit was timely.[82] The Tenth Circuit is the only circuit to have held that *American Pipe* tolling can apply to the three-year Section 13 time bar.[83]

In 2013, the Second Circuit took up the issue in *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.*[84] In that case, the Police and Fire Retirement System of the City of Detroit ("Detroit PFRS") and the Wyoming State Treasurer and the Wyoming Retirement System (collectively "Wyoming") each filed class actions alleging claims against IndyMac for violations of multiple provisions of the Securities Act of 1933, including violations of Section 11.[85] The two class actions were subsequently consolidated, with Wyoming as the lead plaintiff.[86] After the actions were consolidated, the district court dismissed the entire action on the grounds that Wyoming, the only named plaintiff, lacked standing.[87] Detroit PFRS and other members of the class filed motions to intervene to assert their Section 11

76. 223 F.3d 1155 (10th Cir. 2000).

77. *Id.* at 1157.

78. *Id.*

79. *Id.* at 1166.

80. *Id.*

81. The Tenth Circuit in this case characterized *American Pipe* tolling as "legal" tolling rather than "equitable" tolling. *Id.* at 1166–67. The Tenth Circuit stated that equitable tolling was appropriate when a plaintiff had missed a filing deadline due to a mistake in the pleading filed or due to opposing counsel's misconduct. *Id.* at 1166. The court stated that legal tolling occurs when "an action is commenced and class certification is pending." *Id.* at 1167. This Comment accepts the argument that *American Pipe* tolling is properly classified as "equitable" tolling. *See infra* Part II.A.2. The debate regarding the distinctions between "legal" and "equitable" tolling in the *American Pipe* decision, however, is outside the scope of this Comment.

82. *Joseph*, 223 F.3d at 1168.

83. *See infra* Part I.C (discussing different holdings from the Second Circuit and the Sixth Circuit).

84. 721 F.3d 95 (2d Cir. 2013).

85. *Id.* at 101–02.

86. *Id.* at 102.

87. *Id.* at 103.

claims against the defendants.[88] After an extensive discussion about the differences between statutes of limitations and repose,[89] the Second Circuit held that *American Pipe* tolling did not apply to the statute of repose in Section 13 of the Securities Act of 1933.[90] As a result, Detroit PFRS's motion to intervene in the action was untimely.[91]

Most recently in 2016, the Sixth Circuit also took up the issue in *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*[92] In *Stein*, the defendants made their last public offerings in July 2008, and the Stein plaintiffs initiated their individual action alleging Section 11 violations in October 2013—more than five years after the defendants' last public offerings.[93] The plaintiffs claimed that the pending certification of two other class actions filed against the defendants—filed first in 2007 and transferred to federal district court in Tennessee in 2009—tolled the statutory time restrictions in Section 13.[94] After the Sixth Circuit acknowledged the circuit split regarding whether the three-year statute of repose could be tolled, it went through the analyses from both *Joseph* and *IndyMac*, ultimately finding the Second Circuit's reasoning in *IndyMac* to be the "more cogent and persuasive rule."[95] As a result, the Sixth Circuit also held that *American Pipe* tolling does not apply to the three-year statute of repose in Section 13.[96] After the decisions from the Second, Sixth, and Tenth Circuits, courts were fractured regarding the effect *American Pipe* had on Section 13.[97]

D. The Supreme Court's Decision in California Public Employees' Retirement System v. ANZ Securities, Inc. *That* American Pipe *Tolling Does Not Apply to the Section 13 Statute of Repose*

In *California Public Employees' Retirement System v. ANZ Securities, Inc.*, the Supreme Court affirmed the Second Circuit's decision to dismiss CalPERS's individual claim as untimely filed.[98] The Court held that because the three-year time bar enacted in Section 13 of the Securities Act of

88. *Id.*

89. *Id.* at 106–07 (finding that the three-year bar in Section 13 is a statute of repose).

90. *Id.* at 109 ("[A]pplication of the [equitable tolling] rule to Section 13's three-year repose period is barred by *Lampf*, which states that equitable 'tolling principles do not apply to that period.'" (quoting Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363 (1991))).

91. *Id.* at 112–13.

92. 821 F.3d 780 (6th Cir. 2016).

93. *Id.* at 792.

94. *Id.* at 785, 792.

95. *Id.* at 793.

96. *Id.* at 794–95.

97. *See supra* Part I.C.

98. Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042, 2055 (2017).

1933[99] was a statute of repose, the filing of the individual complaint could not be tolled by the filing and pending certification of a class action to bring it within the time limit.[100] The Court held that a statute of repose supersedes a court's equitable power to modify statutory time limits.[101] Because the *American Pipe* tolling rule upon which CalPERS relied is grounded in that equitable power, the Court held that it could not apply to the three-year bar in Section 13.[102] As a result, the Court dismissed CalPERS's individual suit against Respondents.[103]

1. *Factual Background and the Lower Court's Holding in* In re Lehman Brothers Securities & ERISA Litigation

Before declaring bankruptcy in September 2008, Lehman Brothers used public securities offerings to raise capital in 2007 and 2008.[104] CalPERS, the largest public pension fund in the United States, along with many other investors, purchased some of these securities.[105] Shortly before Lehman Brothers announced its bankruptcy filing, a federal putative class action regarding the securities they sold was filed on June 18, 2008,[106] in the Southern District of New York against various financial firms[107] (collectively "Respondents") that served as underwriters in the securities transactions.[108] The class was filed "on behalf of all persons who purchased the identified securities," which included CalPERS.[109] The class action[110] complaint alleged that the underwriting firms violated Section 11 of the Securities Act of 1933[111] by making material misstatements and/or omissions in the registration statements for some of Lehman Brothers' security offerings.[112]

99. Securities Act of 1933 § 13, 15 U.S.C. § 77m (2016).

100. *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2055.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 2047–48.

105. *Id.* at 2047.

106. Petition for Writ of Certiorari at 3, *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. 2042 (No. 16-373).

107. A total of twenty-nine firms were named as respondents in this action. A full list can be found in an appendix to the majority opinion. *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2048; *see also id.* at 2055 (providing the full list of the named financial firms).

108. *Id.* at 2047–48.

109. *Id.* at 2048.

110. This action was consolidated with other suits alleging securities violations against Lehman Brothers in a single, multidistrict suit. *Id.*

111. Securities Act of 1933 § 11, 15 U.S.C. § 77k (2016).

112. *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2048.

In February 2011, after waiting almost three years for the class action in the Southern District of New York to be certified,[113] CalPERS filed its own federal claim against Respondents in the Northern District of California.[114] CalPERS's complaint alleged the same Section 11 violations as the class action, but it was filed only on CalPERS's own behalf.[115] This claim was consolidated with the existing multidistrict litigation in New York, but shortly after this transfer, the class action reached a settlement.[116] CalPERS opted out of the class settlement to proceed with its individual claims.[117]

After the class action settlement was finalized, Respondents moved to dismiss CalPERS's individual suit, claiming that the action was not filed within the three-year time bar enacted by Section 13 of the Securities Act.[118] CalPERS claimed that the three-year period was tolled while the class action certification was pending, so its individual action was still timely filed.[119] The district court disagreed and held that the time bar in Section 13 was not subject to tolling.[120] CalPERS then appealed to the Second Circuit.[121]

The Second Circuit primarily analyzed whether the tolling principle the Supreme Court announced in *American Pipe & Construction Co. v. Utah*[122] applied not only to statutes of limitations but also to statutes of repose.[123] Because the Second Circuit found that the three-year bar in Section 13 was a legislatively enacted statute of repose,[124] it found that the statute could not be affected by a tolling rule grounded in equity.[125] Additionally, the Second Circuit rejected CalPERS's argument that its individual claim was "essentially 'filed'" just because the class action, of which CalPERS was a member, was timely filed.[126] The Second Circuit found that if an individual class member's claims could be "essentially 'filed'" in the class

113. *See* text accompanying *supra* notes 13–14.

114. *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2048.

115. *Id.*

116. *Id.*

117. *Id.*; *see also* Brief for Petitioner at 4–5, *Cal. Pub. Emps.' Ret. Sys,. Inc.*, 137 S. Ct. 2042 (No. 16-373) (detailing the delay in and subsequent settlement of the class action lawsuit).

118. *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2048. CalPERS brought six individual Section 11 actions against the Respondents (among other claims not relevant to this Comment), one of which was found to be timely and was allowed to proceed. Brief for Petitioner at 6 n.2, *Cal. Pub. Emps.' Ret. Sys,. Inc.*, 137 S. Ct. 2042 (No. 16-373). The single timely Section 11 claim resulted in settlement. *Id.*

119. *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2048.

120. *Id.*

121. *Id.*

122. 414 U.S. 538 (1974).

123. *In re* Lehman Bros. Secs. & ERISA Litig., 655 F. App'x 13, 14–15 (2d Cir. 2016).

124. *See supra* Part I.C.

125. *In re Lehman Bros.*, 655 F. App'x at 15.

126. *Id.*

action's complaint, *American Pipe* tolling would be irrelevant all together.[127] The Second Circuit also noted that it had already held in *Police & Fire Retirement Systems of Detroit v. IndyMac MBS, Inc.*[128] that Section 13 was a statute of repose not subject to *American Pipe* tolling.[129] As a result, the Second Circuit affirmed the district court's decision by summary order to dismiss CalPERS's individual action as untimely.[130] CalPERS subsequently filed a petition for a writ of certiorari, which the United States Supreme Court granted to consider whether "the filing of a putative class action serve[s], under the *American Pipe* rule, to satisfy the three-year time limitation in Section 13 of the Securities Act with respect to the claims of putative class members[.]"[131]

2. *The Supreme Court's Reasoning in* California Public Employees' Retirement System v. ANZ Securities

The Supreme Court began by examining the nature and purpose of Section 13's three-year bar.[132] Consistent with the Court's prior holdings,[133] the Court found that it was clearly a statute of repose, because the three-year limit in Section 13 demonstrated legislative intent to provide defendants with freedom from any suits after a set period of time.[134] Furthermore, under *CTS Corp. v. Waldburger*,[135] the Court ruled that the fact that the three-year bar begins to run "from the defendant's last culpable act . . . not from the accrual of the claim" is strongly indicative that it is a statute of repose.[136] Additionally, the Court found that Congress's shortening of the time bar from ten years to three years[137] only a year after the Securities Act of 1933 was enacted also demonstrated that Section 13 was a statute of repose designed to protect defendants' financial stability.[138]

After reaffirming that Section 13's three-year bar was a statute of repose, the Court turned to whether the purpose of a statute of repose affects

127. *Id.*

128. 721 F.3d 95 (2d Cir. 2013).

129. *In re Lehman Bros.*, 655 F. App'x at 15; *see also supra* Part I.C.

130. *In re Lehman Bros.*, 655 F. App'x at 16.

131. Petition for Writ of Certiorari at i, Cal. Pub. Emps.' Ret. Sys. v. Moody Inv'rs Serv 137 S. Ct. 2042 (2017) (No. 16-373); Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 811 (2017) (mem.) (granting certiorari as to question 1).

132. *Cal. Pub. Emps.' Ret. Sys., Inc.*, 137 S. Ct. at 2048–49.

133. *See supra* Part I.A.

134. *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2049–50; *see also supra* Part I.A.

135. 134 S. Ct. 2175 (2014).

136. *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2049 (citing *CTS Corp.*, 134 S. Ct. at 2182–83).

137. *See supra* Part I.A.

138. *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2050.

when tolling rules can apply.[139] Because statutes of repose are intended to create an absolute bar against liability for defendants, the Court held that "[t]olling is permissible only where there is a particular indication that the legislature did not intend the statute to provide complete repose."[140] The Court found that because the statute of repose in Section 13 was legislatively enacted, its authority outweighed the Courts' own ability to extend the time limit for equitable purposes.[141] CalPERS specifically argued that Section 13's three-year bar should be tolled based on the tolling principle the Supreme Court recognized in *American Pipe*.[142] However, the Court rejected this argument not only because the applicable time bar in *American Pipe* was a statute of limitations and not of repose, but also because the tolling principle derived from equity principles, not from legislative authority.[143] As such, the Court held that the equitable tolling rule from *American Pipe* did not apply to Section 13's three-year time bar.[144]

The Court next addressed CalPERS's four counterarguments that tolling should apply and dismissed them all in turn.[145] First, CalPERS asserted that the case at bar was indistinguishable from *American Pipe*.[146] The Court quickly rebuffed this claim because the statutory time bar in *American Pipe* was a statute of limitations, not of repose, and it "began to run when 'the cause of action accrued.'"[147] Next, CalPERS argued that because the class action complaint was timely filed, it fulfilled the timeliness requirements for later suits filed by individual class members.[148] CalPERS reasoned that Respondents had sufficient notice of pending claims against them.[149] However, the Court stated that allowing tolling rules to apply to individual suits filed by class action members would contradict the purpose of a statute of repose by greatly expanding a defendant's potential liability.[150] Third, CalPERS proposed that a dismissal of its individual suit would eliminate its right to opt out of a class action.[151] The Court responded to this contention by stating that opting out of a class action does not provide a plaintiff with

139. *Id.*
140. *Id.*
141. *Id.* at 2051.
142. *Id.*
143. *Id.*
144. *Id.* at 2052.
145. *Id.*
146. *Id.*
147. *Id.* at 2052–53 (quoting Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 541 n.2 (1974)).
148. *Id.* at 2053.
149. *Id.*
150. *Id.* For further discussion on the purpose and classification of statutes of repose, *see infra* Part II.A.
151. *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2053.

the right to disregard statutory time limits.[152] Finally, CalPERS argued that if the Court failed to apply *American Pipe* tolling to statutes of repose, the result would cause great inefficiency in the courts by burdening them with protective filings from class members.[153] The Court ruled that, not only did it still not have the authority to override the statutory time limit, but there was also no evidence there would be an "influx of protective filings."[154]

Alternatively, CalPERS argued that even without applying tolling principles, its individual suit was timely filed because the class action "brought" CalPERS's claims within the required time period.[155] CalPERS contended that "an 'action' is 'brought' when substantive claims are presented to any court, rather than when a particular complaint is filed."[156] However, the Court found that an "action" does not refer to the content of its claims but rather to the specific judicial proceeding.[157] Even though CalPERS's suit alleged the same claims as the class action, its suit was still filed "in a separate forum, on a separate date, by a separate named party."[158] In fact, contrary to CalPERS's alternative argument, the Court stated that if the proper filing of a class action caused all later individual actions to be timely, it would completely defeat the purpose of tolling—a principle the Court has described as "necessary."[159] As a result, the Court also dismissed CalPERS's alternative argument.[160]

The Court held that Section 13's three-year time bar is a statute of repose that is designed to protect defendants against future liability after a certain period of time has passed.[161] The Court further held that this statute overcomes a court's traditional equitable power to alter time limits, and as a result the equitable tolling principle from *American Pipe* cannot extend the

152. *Id.*

153. *Id.*

154. *Id.* at 2053–54. Here, a "protective filing" is an action filed while class action certification is pending to ensure that class members will have an alternate judicial remedy if the class is not certified. *See id.* at 2051 ("[P]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable . . . ." (quoting Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553–54 (1974))).

155. *Id.* at 2054.

156. *Id.*

157. *Id.* (citing BLACK'S LAW DICTIONARY 41 (3d ed. 1933)).

158. *Id.*

159. *Id.* The Court cited several examples in its opinion of cases in which it has found that equitable tolling is necessary. *See, e.g.*, Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350 (1983) (finding that unless filing a class action tolled statute of limitations, members would not be able to rely on the existence of the class action suit to protect their individual rights); Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 555–56 (1974) (finding that interpreting FRCP 23 as permitting tolling is "necessary to insure effectuation of the purposes" of the Rule).

160. *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2054.

161. *Id.* at 2055.

statutory time limit.[162] Therefore, CalPERS did not timely file its individual action against Respondents, and this untimely filing was grounds for dismissal.[163]

In a dissenting opinion, Justice Ginsburg stated that CalPERS's claim was timely initiated when the class action under Section 11 was filed.[164] Justice Ginsburg reasoned that because the class action alleged claims identical to those in the individual action, Respondents had sufficient notice of their liability to all class members.[165] She found that the filing of the class action provided Respondents notice of their liability to the class members within the three-year period required by Section 13, and, therefore, the purpose of the statute of repose was fulfilled.[166] Justice Ginsburg echoed CalPERS's argument that the majority's decision would lead to inefficiencies in that, after this ruling, defendants would have an incentive to prolong discovery, and class members would have an incentive to file protective claims in separate complaints.[167] As a result, she stated that the majority's decision infringed on class members' opt-out rights,[168] and she would have held that CalPERS's claim was timely filed, reversing the Second Circuit.[169]

162. *Id.*

163. *Id.*

164. *Id.* at 2056 (5-4 decision) (Ginsburg, J., dissenting) (citing Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 550 (1974)).

165. *Id.*

166. *Id.* This Comment discusses this contention *infra* at Part II.C.

167. *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2058. In a study conducted by NERA Economic Consulting, which examined, in part, securities class action cases filed and resolved from 2000 to 2016, researchers discovered that thirty percent of class actions took one to two years to gain class certification after the filing of the first complaint, and another thirty percent of class actions took two to three years to gain class certification. BOETTRICH & STARYKH, *supra* note 59, at 23 fig.19. When reviewing this study and others of similar nature, one of the amicus briefs supporting the petitioner pointed out that the time it takes for a class to be certified along with the median time it takes for a class action to settle (three years) support the allegation that individual class members will have significant incentives to file either motions to intervene or individual complaints in order to protect their individual claims from being barred by the repose period. Brief of Retired Federal Judges as Amici Curiae in Support of Petitioner at 9–10, *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. 2042 (No. 16-373).

168. Justice Ginsburg drew a comparison to *Wal-Mart Stores, Inc. v. Dukes*, which states, "[i]n the context of a class action predominantly for money damages . . . [the] absence of notice and opt out violates due process." 564 U.S. 338, 363 (2011) (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985)). Justice Ginsburg used this case to support her argument that without filing additional protective claims within the repose period, class members could potentially lose their "constitutionally shielded right to opt out of the class." *Cal. Pub. Emps.' Ret. Sys.*, 137 S. Ct. at 2057 (5-4 decision) (Ginsburg, J., dissenting).

169. *Id.* at 2058.

II. ANALYSIS

The Supreme Court in *California Public Employees' Retirement System v. ANZ Securities, Inc.* was correct in holding that *American Pipe* tolling does not apply to the statute of repose in Section 13 of the Securities Act of 1933, because that statute's legislative history indicates that Congress intended the three-year provision to be an absolute bar on defendants' liability.[170] This holding can be read broadly as applying to all statutes of repose or narrowly as only applying to the statute of repose in Section 13.[171] But because statutes of repose provide defendants with a substantive right to be free from future liability after a specific period of time, the Court's holding should be read broadly.[172]

This Part will first examine why the Supreme Court was correct in finding that the statute of repose in Section 13 was not subject to *American Pipe* tolling.[173] Next, this Part will argue that the Court's holding should be read broadly as applying to all statutes of repose, because statutes of repose provide defendants with a substantive right that cannot be infringed upon by judicially enacted tolling.[174] Third, this Part will examine the counterargument that this holding should be read narrowly as only applying to Section 13, ultimately finding that a narrow reading is not the legally correct conclusion.[175]

A. The Supreme Court Was Correct in Holding That American Pipe *Tolling Does Not Apply to the Statute of Repose in Section 13 of the Securities Act of 1933.*

Section 13 of the Securities Act of 1933 contains clear, decisive language to indicate that Congress did not intend for claims to be brought under this provision after three years.[176] Congress's failure to carve out an exception illustrates its underlying intent to create an absolute bar; thus, the Supreme Court was correct in holding that *American Pipe* tolling does not apply to the statute of repose in Section 13.[177]

1. The Clear Language and Lack of Exception Contained in Section 13 Support the Finding That the Legislative Intent of the

170. *See infra* Part II.A.
171. *Compare infra* Part II.B, *with infra* Part II.C.
172. *See infra* Part II.B.
173. *See infra* Part II.A.
174. *See infra* Part II.B.
175. *See infra* Part II.C.
176. *See supra* Part I.A.; *see also infra* Part II.A.1–2.
177. *See supra* Part I.A.; *see also infra* Part II.A.1–2.

Three-Year Provision Was to Completely Absolve Defendants of Future Liability

"*In no event* shall any such action be brought to enforce liability . . . more than three years after the security was bona fide offered to the public . . . ."[178] The message of this provision is clear: plaintiffs cannot bring a claim more than three years after a defendant places a security on the market, no matter what.[179] The plain meaning rule in statutory interpretation provides that "where the language of a statute is plain, the sole role of the courts is to enforce it according to its terms."[180] The Court in *California Public Employees' Retirement Systems* did exactly that.[181] Additionally, the Court made a point to note that Section 13 did not contain an express exception, which would have indicated intent on the part of the legislature to modify the absolute statutory restriction.[182]

The Court used the language of the statute and its lack of exception to support the conclusion that Congress intended the three-year bar in Section 13 of the Securities Act of 1933 to be an absolute bar to a defendant's future liability.[183] The legislative history of Section 13 also bolsters this conclusion.[184] Merely a year after the Securities Act of 1933 was enacted, Congress dramatically changed the length of the statute of repose in Section 13 from ten years to three years.[185] This significant shortening of the time during which a plaintiff can bring an action under Section 13 suggests that Congress intended for defendants to have greater freedom from liability than provided under the original statute.[186] Comparing the current version of

178. Securities Act of 1933 § 13, 15 U.S.C. § 77m (2016) (emphasis added).

179. *See* 2 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 7:61, Westlaw (database updated Oct. 2017) ("[T]he generally accepted rule is that the three-year repose period is unconditional and therefore is not tolled . . . .").

180. LARRY M. EIG, CONG. RESEARCH SERV., 97-589 STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 41 (2011), https://fas.org/sgp/crs/misc/97-589.pdf; *see, e.g.*, Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475–76 (1992) (adhering to the plain meaning of Section 33(g) of the Longshore and Harbor Workers' Compensation Act and stating, "[t]he controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written").

181. Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042, 2049 (2017) ("The statute provides in clear terms that '[i]n no event' shall an action be brought more than three years after the securities offering on which it is based. This instruction admits of no exception and on its face creates a fixed bar against future liability." (citation omitted)).

182. *Id.* at 2050.

183. *Id.*

184. *See supra* Part I.A.

185. *Compare* Securities Act of 1933, ch. 38, § 13, 48 Stat. 74, 84 (codified as amended at 15 U.S.C. § 77m (2016)), *with* Securities Exchange Act of 1934, ch. 404, sec. 207, § 13, 48 Stat. 881, 908 (codified as amended at 15 U.S.C. § 77m (2016)).

186. *Cal. Pub. Emps. Ret. Sys.*, 137 S. Ct. at 2050 ("The evident design of the shortened statutory period was to protect defendants' financial security in fast-changing markets by reducing the open period for potential liability.").

a statute with the language of its previous iterations best reflects the goals of Congress when enacting a statute.[187] Based on the legislative history, coupled with the content of the statute itself, the Court correctly determined that the purpose of the statute of repose in Section 13 was to absolve defendants of future liability under this provision, without exception, after three years.[188]

2. *Because* American Pipe *Tolling Was Created by the Equitable Powers of the Court, It Cannot Outweigh Clear Statutory Intent That a Statute Should Have No Exceptions After a Specified Time Period*

As discussed in Part I of this Comment, *American Pipe & Construction Co. v. Utah*[189] created a tolling principle in which statutes of limitations can be tolled while a class action certification is pending.[190] The Court in *American Pipe* specifically stated that it based its tolling mechanism on its "judicial power to toll statutes of limitation."[191] This judicial power is an equitable one—courts use it when adhering to the absolute legal rule would cause an unfair hardship.[192] But there are limits on a court's equitable power, and in articulating when a statutory time limitation can be tolled, the *American Pipe* Court stated that the correct test is "whether tolling the limitation in a given context is consonant with the legislative scheme."[193]

The language of the *American Pipe* Court itself admits that if tolling a time limitation would be inconsistent with the statute's legislative history, tolling would not be appropriate.[194] The legislative history of Section 13 of the Securities Act of 1933[195] indicates that it is the very type of statute to which application of *American Pipe* tolling would be inappropriate.[196] Congress intended that the three-year statute of repose in Section 13 be subject to no exception.[197] As a result, the Court in *California Public Employees' Retirement Systems* correctly held that *American Pipe* tolling does not apply to the statute of repose in Section 13 of the Securities Act of 1933.[198]

187. *See* EIG, *supra* note 180, at 44.
188. *See supra* Part I.A.
189. 414 U.S. 538 (1974).
190. *See supra* Part I.B.
191. *Am. Pipe*, 414 U.S. at 558.
192. Holland v. Florida, 560 U.S. 631, 649–50 (2010).
193. *Am. Pipe*, 414 U.S. at 557–58.
194. *Id.*
195. Securities Act of 1933 § 13, 15 U.S.C. § 77m (2016).
196. *See supra* Part I.A.; *see also supra* Part II.A.1.
197. *See supra* Part I.A.
198. Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042, 2055 (2017).

B. The Supreme Court's Holding in California Public Employees' Retirement Systems v. ANZ Securities, Inc. *Should Be Read Broadly as Applying to All Statutes of Repose*

A plaintiff's substantive right to file a claim against a defendant for filing a false or misleading registration statement derives from Section 11 of the Securities Act of 1933.[199] But the Securities Act of 1933 also provides *defendants* with a substantive right to be free from liability after three years through Section 13's statute of repose.[200] The purpose of a statute of repose is to provide a defendant with a substantive right to be free from liability after a legislatively determined period of time.[201] Because statutes of repose provide defendants with a statutory, substantive right, they cannot be superseded by judicially enacted equitable principles.[202] As a result, the Supreme Court's holding in *California Public Employees' Retirement System v. ANZ Securities, Inc.* should be read broadly as applying to all statutes of repose, and not just to Section 13 of the Securities Act of 1933.[203]

Statutes of limitations and statutes of repose, while both setting a time limit on a plaintiff's ability to file a claim, are very different provisions that serve diverse purposes.[204] Statutes of limitations create an affirmative defense for a defendant when a plaintiff does not file a claim within a certain period of time after the injury occurs or the harm was discovered.[205] Statutes of repose, on the other hand, actually *eliminate* a plaintiff's cause of action after a specific period of time following the defendant's last culpable action by providing a defendant with the substantive right to be free from future liability.[206] Unlike a statute of limitations, a statute of repose is measured against the defendant's culpable act, as opposed to the plaintiff's injury.[207] While a statute of limitations defines the time within which a plaintiff can initiate a suit, a statute of repose has nothing to do with the plaintiff's injury.[208] Because of this distinction, a cause of action under a

199. *See supra* Part I.A.

200. *See supra* Part I.A.

201. *See infra* notes 206–211 and accompanying text.

202. *See infra* notes 212–221 and accompanying text.

203. *See infra* notes 224–231 and accompanying text.

204. Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 597 F.3d 84, 88 n.4 (2d Cir. 2010) ("Statutes of repose and statutes of limitations are often confused, though they are distinct."); *see also supra* Part I.A.

205. *See Ma*, 597 F.3d at 88 n.4 (citing Stuart v. Am. Cyanamid Co., 158 F.3d 622, 627 (2d Cir. 1998)).

206. *Id.* (citing P. Stolz Family P'ship v. Daum, 355 F.3d 92, 102–03 (2d Cir. 2004)).

207. *See id.* (explaining that a statute of repose is "usually measured from one of the defendant's acts").

208. *P. Stolz Family P'ship*, 355 F.3d at 102.

statute of repose could be extinguished before the injury to the plaintiff even occurs.[209]

A statute of repose outlines the amount of time the plaintiff has to bring suit before the defendant can be totally free of liability.[210] As a result, a statute of repose "creates a substantive right in those protected to be free from liability after a legislatively-determined period of time."[211] Because a statute of repose creates a substantive right for defendants, generally this right is only subject to statutory exceptions enumerated in the statute of repose itself.[212] Therefore, statutes of repose are not subject to equitable considerations that would abridge the defendant's right to be free from future liability,[213] because a statute of repose creates a statutory, substantive right for a defendant. When describing the difference between statutes of limitations and statutes of repose, the Second Circuit articulated:

> [S]tatutes of repose affect the underlying right, not just the remedy, and thus they "run without interruption once the necessary triggering event has occurred, even if equitable considerations would warrant tolling or even if the plaintiff has not yet, or could not yet have, discovered that she has a cause of action."[214]

Arguably, statutes of repose are so unyielding to minimize the risk of error that increases as the length of time between the defendant's action and the alleged injury also increases.[215] Because of the increased risk of error, statutes of repose put an "outer limit" on a plaintiff's right to bring a claim, which creates an absolute bar to claims brought after that limit.[216]

The Supreme Court recently compared a statute of repose to a discharge in bankruptcy: It provides "a fresh start or freedom from liability."[217] Supplementing the idea that statutes of repose allow defendants freedom from liability, the legal encyclopedia *Corpus Juris Secundum* states that the substantive right a statute of repose creates sets a period of time after which

209. *Id.* at 103 (citing *Stuart*, 158 F.3d at 627).

210. *Id.* at 102.

211. Amoco Prod. Co. v. Newton Sheep Co., 85 F.3d 1464, 1472 (10th Cir. 1996) (quoting Webb v. United States, 66 F.3d 691, 701 (4th Cir. 1995)).

212. *P. Stolz Family P'ship*, 355 F.3d at 102 (citing 1 CALVIN W. CORMAN, LIMITATIONS & ACTIONS § 1.1, at 4–5 (1991)).

213. *Id.* at 102–03.

214. Fed. Hous. Fin. Agency v. UBS Americas Inc., 712 F.3d 136, 140 (2d Cir. 2013) (quoting *P. Stolz Family P'ship*, 355 F.3d at 102–03); *see also* First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 866 (4th Cir. 1989) ("[A] statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." (citing Knox v. AC & S, Inc., 690 F. Supp. 752, 759 (S.D. Ind. 1988))).

215. McCann v. Hy-Vee, Inc., 663 F.3d 926, 930 (7th Cir. 2011).

216. CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2182 (2014).

217. *Id.* at 2183.

a defendant's potential liability will be extinguished "and will not be tolled for any reason."[218] The Supreme Court has adhered to the absolute "for any reason" concept and has held that statutes of repose cannot even be tolled in extreme cases that are outside a plaintiff's control.[219] In order to protect the substantive right a statute of repose provides to a defendant, statutes of repose cannot be subject to equitable tolling. The tolling provision from *American Pipe & Construction Co. v. Utah*[220] was enacted by the equitable powers of the Supreme Court, not by a legislatively enacted statute, and is therefore considered equitable tolling.[221]

The Supreme Court, in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, reiterated that the purpose of a statute of repose, designed to create complete freedom from liability to defendants, "supersedes the application of a tolling rule based in equity."[222] Following this principle, the Court stated that it did not have the authority to rewrite or ignore the plain meaning of the statute of repose in Section 13 of the Securities Act of 1933.[223] The Court found that statutes of repose are intended to provide defendants with "more certainty and reliability."[224] It found that this purpose is a necessity in the volatile financial marketplace where "stability and reliance are essential" to the operation of financial actors.[225]

The Court concluded its opinion by stating that it did not need to consider equitable principles or balance interests, because the substantive right provided to the defendant by the statute of repose took the case outside the realm of *American Pipe* tolling.[226] The Court then summarized its final analysis as follows:

> The 3-year time bar in § 13 of the Securities Act is a statute of repose. Its purpose and design are to protect defendants against future liability. The statute displaces the traditional power of courts to modify statutory time limits in the name of equity. Because the *American Pipe* tolling rule is rooted in those equitable powers, it cannot extend the 3-year period.[227]

218. 54 C.J.S. *Limitations of Actions* § 7, Westlaw (database updated Feb. 2018).

219. *CTS Corp.*, 134 S. Ct. at 2183 ("Statutes of repose . . . generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control.").

220. 414 U.S. 538 (1974).

221. *See supra* Part II.A.2.

222. Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042, 2052 (2017).

223. *Id.* at 2053–54 (citing Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158, 2169 (2015)).

224. *Id.* at 2055.

225. *Id.*

226. *See id.* at 2055 (stating, "the mandate of the statute of repose takes the case outside the bounds of the *American Pipe* rule").

227. *Id.*

The reasoning the Court uses to hold that *American Pipe* equitable tolling cannot apply to Section 13 is based on not only the purpose of the Section 13 statute of repose, but on the purpose of statutes of repose as a whole.[228] Therefore, the analysis presented by the Court does not limit itself to applying only to the Securities Act of 1933.

While not all statutes of repose apply to securities laws,[229] they all have the same purpose of providing defendants with a total freedom from liability after a certain period of time.[230] Because the purpose of a statute of repose does not change from statute to statute, the Court's final analysis in this case can be applied to all statutes of repose. By applying this analysis broadly, and consistently with Supreme Court precedent, statutes of repose cannot be subject to equitable tolling.[231]

C. Discussing the Counterargument That the Supreme Court's Holding in California Public Employees' Retirement System v. ANZ Securities, Inc. *Should Be Read Narrowly as Only Applying to the Statute of Repose in Section 13, and Finding It Legally Unconvincing*

In her dissenting opinion in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, Justice Ginsburg briefly touched on the idea that preventing CalPERS from recovery, despite the class action complaint's timely filing, after it opted out of the class and tried to proceed individually, contradicts FRCP 23.[232] The claim that a timely filed class action also launches timely individual actions for *all* class members was also argued in *American Pipe & Construction Co. v. Utah*.[233] In *American Pipe*, the Court stated, "the filing of a timely class action complaint commences

228. *Compare id.* ("Its purpose and design are to protect defendants from future liability."), *with* Amoco Prod. Co. v. Newton Sheep Co., 85 F.3d 1464, 1472 (10th Cir. 1996) ("[A] statute of repose . . . 'creates a substantive right in those protected to be free from liability after a legislatively-determined period of time.'" (quoting Webb v. United States, 66 F.3d 691, 700–01 (4th Cir. 1995))).

229. *See, e.g.*, N.C. GEN. STAT. Ann. §1-50 (West, Westlaw through 2017 Reg. Sess.) (mandating that actions based on defective or unsafe conditions caused by improvements to real property cannot be filed more than six years after the last act or omission of the defendant); MD. CODE Ann., CTS. & JUD. PROC., § 5-109 (West, Westlaw through ch.1&2 from 2018 Reg. Sess.) (mandating that in suits against healthcare providers, the suit must be filed by the earlier of five years after the injury was committed—the act of the defendant—or three years after the injury was discovered).

230. P. Stolz Family P'ship v. Daum, 355 F.3d 92, 102 (2d Cir. 2004).

231. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363 (1991) (stating, "a period of repose [is] inconsistent with tolling").

232. 137 S. Ct. 2042, 2056 (2017) (5-4 decision) (Ginsburg, J., dissenting) (citing FED. R. CIV. P. 23(c)(2)(B)(v)).

233. 414 U.S. 538 (1974).

the action for all members of the class."[234] *American Pipe* found that holding otherwise would frustrate the purpose of FRCP 23, because class actions are designed to avoid "multiplicity of activity" in the courts.[235]

The Supreme Court promulgated the Federal Rules of Civil Procedure, and they possess the same authority as any other law.[236] However, because the Supreme Court prescribed these Rules, they are subject to analysis under the Rules Enabling Act ("REA").[237] The REA provides that rules enacted by the Supreme Court "shall not abridge, enlarge or modify any substantive right."[238] When faced with issues regarding whether a Federal Rule might be in contention with a statutory substantive right, the Court has held that it will not interpret a Rule in a way that would render the Rule invalid under the REA so long as an alternate interpretation that preserves the Rule's integrity is available.[239]

This Comment need not reiterate in depth that the *American Pipe* Court was dealing with a statute of limitations, as opposed to one of repose.[240] But it is significant that a statute of repose, like the one in Section 13 and unlike the statute of limitations in *American Pipe*, confers to the Respondents a substantive right to be free from liability after three years.[241] If the Court interpreted FRCP 23 to allow a class member's individual claim to be filed with the class action complaint, and allowed the claim to proceed after being filed in an individual action more than three years later, the Respondents' substantive right to be free from liability after three years would be frustrated—and therefore "abridged" as forbidden by the REA.[242] While FRCP 23 gives plaintiffs a substantive right to opt-out of a class action,[243] exercising this opt-out right cannot provide plaintiffs with the ability to override the defendant's rights.[244]

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234. *Id.* at 550.

235. *Id.* at 551.

236. 4 CHARLES ALLEN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1030, (Westlaw 4th ed. database updated Apr. 2017).

237. Rules Enabling Act, 28 U.S.C. § 2072 (2016).

238. *Id.* § 2072(b).

239. *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 405 n.7 (2010) ("If all the dissent means is that we should read an ambiguous Federal Rule to avoid 'substantial variations [in outcomes] between state and federal litigation,' we entirely agree." (alteration in original) (quoting Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 504 (2001))); *see also* WRIGHT, *supra* note 236, §1030.

240. *See supra* Parts I.B, II.A.2.

241. *See supra* Part II.B.

242. Police & Fire Ret. Sys. of Detroit v. IndyMac IBS, Inc., 721 F.3d 95, 109 (2d Cir. 2013) (citing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 367 (2011)).

243. FED. R. CIV. P. 23(c)(2)(B)(v).

244. *See* Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc., 137 S. Ct. 2042, 2053 (2017) ("It does not follow, however, from any privilege to opt out that an ensuing suit can be filed without regard to mandatory time limits set by statute.").

The counterargument that the purpose of FRCP 23 would allow a class member's individual claim to be essentially filed with the class action complaint[245] would frustrate the substantive right provided by a statute of repose[246] in violation of the REA.[247] Therefore, FRCP 23 cannot convincingly support the argument the holding in *California Public Employees' Retirement System v. ANZ Securities, Inc.* should be read narrowly and should leave open the possibility of other statutes of repose being subject to tolling. As a result, the Court's holding should be read broadly as applying to all statutes of repose.[248]

III. CONCLUSION

The Supreme Court came to the correct conclusion in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, that the statute of repose in Section 13 of the Securities Act of 1933 is not subject to equitable *American Pipe* tolling.[249] This holding should be read broadly as applying to all statutes of repose, not just to the one in Section 13, because statutes of repose provide defendants with a substantive right to be free from future liability after a specified period of time.[250] In fact, courts and the wider legal community seem already to be construing the holding in this way, with the Southern District of New York recently stating, "Although the *ANZ* case involved one particular statute of repose, the case's reasoning extends to other statutes of repose."[251] Additionally, only five weeks after the Court's holding in this case, the Third Circuit extended its reasoning to claims brought under Sections 10(b), 20(a), and 20A of the Securities Exchange Act of 1934.[252] The Third Circuit interpreted the Court's holding in *Cali-*

245. *Id.* at 2056 (5-4 decision) (Ginsburg, J., dissenting).

246. *See supra* Part II.B.

247. *See supra* text accompanying notes 237–238, 242.

248. *See supra* Part II.B.

249. *See supra* Part II.A.

250. *See supra* Part II.B.

251. Leber v. Citigroup 401(k) Plan Inv. Comm., 07-Cv-9329, 2017 U.S. Dist. LEXIS 194293, at *12–13 (S.D.N.Y. Nov. 27, 2017); *see also* 1-I FED. CLASS ACTION DESKBOOK § 1.07 (2017) ("*American Pipe* tolling applies to statutes of limitations, but does not apply to statutes of repose."); Michael R. Pennington, J. Thomas Richie & Robert James Campbell, *For Whom the Pipe Tolls: SCOTUS to Decide Whether* American Pipe *Tolling Applies to "Piggyback" Class Actions*, DECLASSIFIED (Dec. 14, 2017), https://www.classactiondeclassified.com/2017/12/pipe-tolls-scotus-decide-whether-american-pipe-tolling-applies-piggyback-class-actions/ ("One of the many circuit splits [concerning *American Pipe* tolling] was resolved a few months ago when the Supreme Court ruled that *American Pipe* tolling does not apply to statutes of repose." (citing Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042 (2017))).

252. North Sound Capital, LLC v. Merck & Co., 702 F. App'x 75, 77 (3d Cir. 2017); *see also* Alan R. Glickman, et al., *Extending* CalPERS v. ANZ Securities *to Exchange Act Cases*, LAW360 (Sept. 21, 2017), (detailing the Third Circuit's application of the rule from *CalPERS* to another statute of repose).

fornia Public Employees' Retirement System as stating "the *American Pipe* tolling rule cannot be invoked to toll the running of time under the statutes of repose at issue."[253]

While CalPERS various arguments did not persuade the Court to apply *American Pipe* tolling to the Section 13 statute of repose, they were ultimately not prevented from recovering for the improperly filed Lehman Brothers offerings. After the Court's opinion was rendered, a spokeswoman for CalPERS said:

> Since the collapse of Lehman Brothers in 2008, CalPERS has recovered $28.85 million from a number of defendants involved with the sale of Lehman's bonds, including the company's auditor, Lehman's officers and directors, and several bond underwriters. . . . The amounts recovered are substantially more than we would have obtained had CalPERS remained in the class-action suit.[254]

Applying the Court's holding to all statutes of repose may seem like a harsh bright-line rule, but CalPERS recovery suggests otherwise. While statutes of repose may bar plaintiffs from pursuing certain untimely claims, they may nonetheless seek alternative routes of relief.[255] Ultimately, applying the Court's holding broadly will uphold the purpose of statutes of repose by allowing defendants the freedom from liability these statutes are designed to provide.[256]

253. *North Sound Capital*, 702 F. App'x at 77.

254. Hazel Bradford, *Supreme Court Rejects CalPERS Class-Action Argument*, PENSIONS & INVESTMENTS (June 26, 2017), http://www.pionline.com/article/20170626/ONLINE/170629865/supreme-court-rejects-calpers-class-action-argument (quoting Megan White, CalPERs spokeswomen).

255. *See, e.g.*, *supra* note 118.

256. *See supra* Part II.B.